

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

RICKY BELLAMY,
Appellant,
v.
DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,
Respondent.

) Case No. DISM-03-0091
)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD
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I. INTRODUCTION

1.1 Hearing. Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Member. The hearing was held at the Employment Security Department, 106 Maple Park, Olympia, Washington, on September 9, 2004, and in the Personnel Appeals Board Hearing, Olympia, Washington on October 22, 2004. WALTER T. HUBBARD, Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 Appearances. Appellant Ricky Bellamy was present and was represented by Douglas Cloud, Attorney at Law. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 Nature of Appeal. This is an appeal from a disciplinary sanction of suspension followed by immediate dismissal for neglect of duty, malfeasance, gross misconduct, and willful violation of agency policy. Respondent alleges that Appellant engaged in inappropriate behavior and physically touched a client.

II. FINDINGS OF FACT

2.1 Appellant Rick Bellamy was a permanent employee for Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on October 17, 2003.

2.2 Appellant began his employment with the state of Washington in 1988, and began working for DSHS in 1991 at the NW Workfirst Community Services Office. As a Workfirst Program Specialist, Appellant was responsible for determining client eligibility for a variety services and he was expected to treat clients with respect. As a part of his training opportunities, Appellant attended prevention of sexual harassment class, and he was provided with numerous agency policies, including Policy 6.04 (Standards of Ethical Conduct), Policy 6.02, (Sexual Harassment and Inappropriate Behavior of a Sexual Nature), and Policy 540 (Employee Relationships with Clients, Vendors and Outside Organizations). During the course of his employment, Appellant received numerous certificates for outstanding performance.

2.3 Appellant has been the subject of a prior disciplinary action, effective July 25, 2001, when Linda Evans, Regional Administrator for Region 5, Community Services Division demoted him from his position as a Financial Services Specialist (FSS) 3 to a position as an FSS 2 for establishing a business and financial relationship with a DSHS client by renting a home to her.

2.4 By letter dated September 19, 2003, Linda Evans Regional Administrator for Region 5, Community Services Division, notified Appellant of his immediate suspension, effective September 19, 2003, followed by dismissal from his position as a Workfirst Program Specialist, effective

1 October 6, 2003. Ms. Evans charged Appellant with neglect of duty, malfeasance, gross
2 misconduct, and willful violation of agency policy. Ms. Evans wrote:

3 ... On August 14, 2003, you engaged in inappropriate behaviors and physically
4 touched client Chanel C. During an intake interview, Chanel explained to you
5 that she was homeless, pregnant and did not know where her boyfriend was. You
6 asked if she had eaten and she said no. You then asked her to meet you at the end
7 of the corridor outside of the Workfirst office, where you took her up the elevator
8 to the cafeteria. You told her she was beautiful and asked where her boyfriend
9 was. You then gave her five dollars to get food, which you slipped into the front
10 pocket of her tight jeans and explained that you did not usually go this far out of
11 your way to help your clients. While standing in front of the vending machines
12 outside of the cafeteria, you hugged her, placed your hands on her buttocks and
13 told her you cared about her case. You then asked if you could go to Vashon
14 Island to see where she lived and she told you that she was not comfortable
15 showing anyone where she lived. ...

16 2.4 Ms. Evans based the above allegations on a letter received from Chanel C. by the agency on
17 August 20, 2003, following her August 14 visit to the department. Shawn Pederson, a former
18 DSHS employee, was a Workfirst Program Specialist. She testified that in her assessment, Chanel
19 C. appeared to be under the influence of alcohol or drugs on August 14, 2003. Appellant was
20 assigned to conduct Chanel C.'s intake for services and benefits, which required that he interview
21 and gather information from her to determine eligibility. During the interview, Chanel C. told
22 Appellant that she was pregnant and homeless. Appellant asked Chanel C. if she had eaten, and she
23 indicated that she had not.

24 2.5 During his testimony before us, Appellant admitted he asked Chanel C. to meet him at the
25 cafeteria so she could eat, that he offered her \$5 to purchase food and, when she refused the money,
26 he slipped the money into the front pocket of her jeans. Appellant admitted he gave Chanel C. a
hug, stated he could not recall whether he touched her buttocks, but if he did, it was not intentional.
Appellant asserted that questions he posed to Chanel C. regarding where she lived were intended to
determine if she was really homeless. Appellant admits he told Chanel C. he did not normally go

1 out of his way to help clients. In light of Appellant's admissions, we find it more likely than not,
2 that he touched Chanel C's. buttocks as alleged in the disciplinary letter.

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4 2.6 Linda Evans was Appellant's appointing authority when the discipline was imposed. Ms.
5 Evans met with Appellant on September 15, 2003, to discuss the allegations. During the meeting,
6 Appellant informed Ms. Evans he suffered from Post Traumatic Stress Disorder (PTSD) as a result
7 of being sexually abused as an adolescent and that he was under extreme stress due to a traumatic
8 event his daughter had suffered. Appellant requested accommodation and suggested to Ms. Evans
9 that she place him in an alternate position where he had no client contact. Appellant provided Ms.
10 Evans with no medical documentation to support a disability or need for accommodation.

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12 2.7 Ms. Evans considered Appellant's response to the Conduct Investigation Report issued to
13 him, along with a copy of Chanel C.'s complaint letter, and Appellant's response that the
14 "allegations are true." Ms. Evans ultimately concluded that Appellant engaged in all the actions
15 alleged by Chanel C. Ms. Evans believed that because of his job, to process benefits, Appellant was
16 in a position of authority, and that he abused that authority by engaging in improper behavior with a
17 client. Ms. Evans also concluded that Appellant violated DSHS Personnel Policy 540, which
18 prohibits employees from using their public positions for private gain or which would result in a
19 conflict of interest; that he violated DSHS Administrative Policy 6.02, which prohibits sexual
20 harassment and inappropriate behavior of sexual nature with other employees and/or clients; and
21 that he violated DSHS Administrative Policy 6.04, standards of ethical conduct for employees.

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23 2.8 When determining the level of discipline here, Ms. Evans weighed Appellant's prior
24 disciplinary action, his length of service with DSHS, and his employment record. However, she
25 found nothing to mitigate the seriousness of his misconduct. Ms. Evans concluded the sanction of
26 termination was appropriate.

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2 2.9 Following the meeting with Ms. Evans, Appellant sought professional help from a licensed
3 mental health counselor who diagnosed him with PTSD.
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5 **III. ARGUMENTS OF THE PARTIES**

6 3.1 Respondent asserts that when Appellant received his Conduct Investigation Report, he
7 admitted the allegations were true and, therefore, the agency proceeded to take disciplinary action.
8 Respondent argues that Appellant's behavior toward Chanel C., an especially vulnerable client, was
9 egregious and violated the trust placed in Appellant by the agency. Respondent asserts that
10 termination is warranted not only because Appellant's actions toward Chanel C. violated DSHS
11 policies, but also because he had a prior incident of inappropriate conduct with a DSHS client.
12 Respondent argues that Appellant presented no compelling evidence to support his claim that Ms.
13 Evans retaliated against him. Respondent further argues that Appellant's request for
14 accommodation was untimely and an employer has no obligation to accommodate an employee who
15 makes a request for accommodation after the misconduct has occurred.
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17 3.2 Appellant admits that he gave Chanel C. \$5 for food and hugged her, but asserts he had no
18 inappropriate sexual or personal motivation for doing so. Appellant contends the appointing
19 authority had improper motive for terminating him because 1) he was erroneously identified as a
20 part of a whistleblower initiated against her and 2) for his refusal to join her church and tithe 10
21 percent of his income to her church. Appellant further asserts that his disability is at issue because
22 at the time of the incident he was under a tremendous amount of stress and was later diagnosed as
23 suffering from PTSD. Appellant argues that the prior discipline was for unrelated reasons and that
24 termination in this case is too severe for a 15-year employee with a history of excellent
25 performance.
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IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.6 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

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4 4.7 Respondent has proven by a preponderance of the credible evidence that Appellant engaged
5 in misconduct when he offered Chanel C. money, placed that money into the pocket of her jeans,
6 hugged her, and touched her buttocks. The testimony that Chanel C. appeared to be under does not
7 mitigate Appellant's actions toward her. Appellant was aware of department's policies and
8 practices concerning sexual harassment prevention, ethical activity by department employees, and a
9 client's right to be treated with respect. DSHS has a duty to protect its clients, and Appellant's
10 actions with Chanel C. went beyond the boundaries of acceptable worker/client relationship.
11 Therefore, Respondent has proven that Appellant's failure to follow established policies undermined
12 the department's efforts to provide effective assistance to clients and rises to the level of gross
13 misconduct. Respondent, however, provided no evidence to substantiate the allegation that
14 Appellant's conduct constituted malfeasance.

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16 4.8 In his defense, Appellant raises the issue of disability and claims that Respondent failed to
17 accommodate his disability. In Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110
18 (1998), appellant Maxwell, a diabetic and manic depressive, asserted that the Board should excuse
19 his admitted misconduct because it was caused by his medical condition. The Court of Appeals
20 upheld the Board's ruling that without evidence that appellant Maxwell's condition caused his
21 behavior, he could not show he was disciplined because of his condition or discriminated against
22 because of his condition. The Court also stated that an employer's duty to accommodate does not
23 arise "unless there is a need for accommodation." The court, quoting from Goodman v. Boeing
24 Co., 127 Wn.2d 408, P.2d 1265 (1995), states that "the employee, of course, retains a duty to
25 cooperate with the employer's efforts by explaining her disability and qualifications. . . .
26 Reasonable accommodation thus envisions an exchange between employer and employee where

1 each seeks and shares information to achieve the best match between the employee's capabilities
2 and available position."

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4 4.9 In the case presented here, Appellant was diagnosed by his therapist as suffering with
5 PTSD; however, this diagnosis was made after Appellant engaged in the misconduct and after he
6 had already met with the appointing authority. Under the circumstances, Respondent was under no
7 obligation to accommodate Appellant's disability.

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9 4.10 Although it is not appropriate to initiate discipline based on prior formal and informal
10 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
11 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.
12 D93-163 (1995).

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14 4.11 In determining whether a sanction imposed is appropriate, consideration must be given to
15 the facts and circumstances, including the seriousness and circumstances of the offenses. The
16 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
17 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
18 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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20 4.12 Appellant claims Ms. Evans' decision to terminate him was retaliatory because he refused to
21 join her church and tithe 10 percent of his income and because she believed he was involved in a
22 whistleblower investigation against her. We find no evidence to substantiate this argument. When
23 reviewing Appellant's work history, his prior disciplinary sanction involving an improper business
24 relationship with a client, and his admissions in this case, we cannot conclude Ms. Evans' decision
25 to terminate him was retaliatory or overly punitive. Therefore, we conclude that under the totality
26 of the circumstances, termination is appropriate and the appeal should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Rickey Bellamy is denied.

DATED this _____ day of _____, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Walter T. Hubbard, Chair

Gerald L. Morgen, Member